



This document is scheduled to be published in the Federal Register on 12/18/2014 and available online at <http://federalregister.gov/a/2014-29653>, and on FDsys.gov

DEPARTMENT OF TRANSPORTATION

[4910-22-P]

Federal Highway Administration

[FHWA Docket No. FHWA-2013-0042]

Major Project Financial Plan Guidance

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Final Notice.

SUMMARY: This final notice announces the availability of Major Project Financial Plan Guidance.

DATES: EFFECTIVE DATE: The final notice is effective [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Jim Sinnette, Office of Innovative Program Delivery, 202-366-1561, james.sinnette@dot.gov or, Janet Myers, Office of the Chief Counsel, 202-366-2019, janet.myers@dot.gov, Federal Highway Administration, 1200 New Jersey Ave., SE., Washington, DC 20590-0001. Office hours for the FHWA are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

This document may be viewed online through the Federal eRulemaking portal at: <http://www.regulations.gov>. Electronic submission and retrieval help and guidelines are available on the Web site. It is available 24 hours each day, 365 days this year. Please follow the instructions. An electronic copy of this document may also be downloaded

from the Office of the Federal Register's Web site at: <http://www.archives.gov/federal-register> and the Government Printing Office's Web site at: <http://www.gpo.gov/fdsys>.

Background

On September 6, 2013, FHWA published a notice and request for comments regarding the FHWA's proposal to revise the Major Project Financial Plan Guidance. Major projects are defined in section 106(h) of title 23, United States Code (23 U.S.C. 106(h)), as projects receiving Federal financial assistance with an estimated total cost of \$500 million or other projects as may be identified by the Secretary. Major projects are typically large, complex projects designed to address major highway needs and require the investment of significant financial resources. The preparation of the annual financial plan, as required by 23 U.S.C. 106(h)(3), ensures that the necessary financial resources are identified, available, and monitored throughout the life of the project.

The proposed Major Project Financial Plan Guidance replaces the existing January 2007 Major Project Financial Plan Guidance. Title 23 U.S.C. 106, as amended by section 1503 of the Moving Ahead for Progress in the 21st Century Act (MAP-21), allows financial plans to include a phasing plan when there are insufficient financial resources to complete the entire project. In addition, 23 U.S.C. 106 now requires recipients of Federal financial assistance to assess the appropriateness of a public-private partnership (P3) to deliver the project. In addition to these MAP-21 changes, the proposed Major Project Financial Plan Guidance also incorporates a recommendation included in a 2009 Government Accountability Office report titled "Federal-Aid Highway: FHWA Has Improved Its Risk Management Approach, but Needs to Improve

Its Oversight of Project Costs” (GA-090-751). The report recommended that financial plans include the cost of financing the project.

Discussion of Comments

I. Summary

All comments received in response to the notice and request for comments have been considered in adopting this final notice. Comments were received from the American Association of State Highway and Transportation Officials (AASHTO), Professional Engineers in California Government (PECG), Ernst & Young Infrastructure Advisors, LLC (E&Y), and representatives of seven State DOTs. The following discussion identifies and summarizes the major comments submitted by the commenters in response to the September 6, 2013, notice and the FHWA’s responses.

II. General Comments – Approval of Financial Plans

Comment: The AASHTO believes that the FHWA approval of financial plans for projects with an estimated cost of \$500 million or more is not supported by the language of the statute (23 U.S.C. 106(h)(1)) and recommends that the guidance be modified to require only that the project sponsor submit the financial plan to the DOT. The AASHTO notes that the DOT would still approve financial plans for projects receiving Transportation Infrastructure Finance and Innovation Act (TIFIA) assistance. The Nevada Department of Transportation (NDOT) notes that the statute only requires submission of financial plans and does not mention approval or concurrence.

FHWA Response: The submission of major project financial plans is required by statute (23 U.S.C. 106(h)(1)). The FHWA's review and approval of major project financial plans is to ensure that the plans contain the information required by 23 U.S.C. 106(h)(3), and is necessary for FHWA to carry out its stewardship and oversight responsibilities for major projects. No changes have been made to the guidance.

Comment: AASHTO recommends adding a statement clarifying that the guidance does not impose any binding legal requirements.

FHWA Response: FHWA acknowledges that this guidance does not impose any binding legal requirements. The purpose of this guidance is to clarify the FHWA review and approval of financial plans. As noted in the guidance, it applies only to the development and updates of major project financial plan. It does not apply to the application of any other Federal requirements. No changes have been made to the guidance.

Comment: The NDOT recommends that the FHWA Division Office determine the acceptability of the financial plans and respond to the sponsor within 30 days.

FHWA Response: The guidance states that FHWA will determine a financial plan's acceptability within 60 days after receipt by the Office of Innovative Program Delivery Project Delivery Team. Due to the importance and complexity associated with financial plans and based on previous experience, FHWA believes that this timeframe is appropriate. No changes have been made to the guidance.

III. General – Project Exemptions

Comment: The Washington State Department of Transportation (WSDOT) and the Arkansas State Highway and Transportation Department (AHTD) recommend that financial plans underway prior to MAP-21 be exempted from this updated guidance.

FHWA Response: Consistent with this comment the final notice states that this guidance will be in effect for all financial plans submitted to FHWA 45 days after date of publication in the Federal Register. This identifies specific criteria that can be verified by FHWA and provide a timeline that will allow financial plans submitted prior to the effective date in the Federal Register to be reviewed by FHWA using the previous guidance. This will help ensure a timely and consistent implementation of the updated guidance. No changes have been made to the guidance.

IV. General – Other Projects (\$100 million to \$500 million)

Comment: The Alaska Department of Transportation and Public Facilities (AKDOT & PF), the Minnesota Department of Transportation (MnDOT), and the PECG recommend that FHWA make a distinction between the guidance for projects with an estimated cost of \$500 million or more and projects with an estimated cost of \$100 million or more that are not designated major projects. The AASHTO recommends that the guidance clarify that financial plans for projects with an estimated cost of \$100 million or more that are not designated major projects will be less detailed.

FHWA Response: The statute (23 U.S.C. 106(i)) uses the same term, “annual financial plan,” for both major projects and other projects (projects with an estimated cost of \$100 million or more that are not designated major projects). The only distinction in the

statute is that financial plans for other projects only need to be made available upon request, which is reflected in the guidance. Thus, financial plans for projects \$100 million to \$500 million must address the same information as financial plans for major projects. No changes have been made to the guidance.

Comment: AASHTO recommends that for projects with an estimated cost of \$100 million or more that are not designated major projects, project sponsors should have the option of submitting a single financial plan that covers multiple projects in a single geographical area.

FHWA Response: The guidance has been modified to allow project sponsors to submit a single financial plan that covers multiple projects with prior concurrence of the FHWA Division Office.

Comment: AASHTO recommends that a project sponsor have the option of preparing a phased financial plan for a project with an estimated cost of \$100 to \$500 million.

FHWA Response: As stated within, this guidance applies to section 106(i) and allows the option to prepare a phased financial plan. (23 U.S.C. 106(h)(1)(B)) No changes have been made to the guidance.

Comment: AASHTO recommends that if a phased financial plan is prepared for a project with an estimated cost of \$100 million to \$500 million, that plan should be deemed to satisfy fiscal constraint requirements for that project.

FHWA Response: The guidance now states that if a phasing plan is included in an approved financial plan and fiscal constraint requirements are met for the funded phase, then pursuant to 23 U.S.C. 106(h)(3)(c) the overall project is deemed to meet fiscal constraint requirements under 23 U.S.C. 134 and 135.

Comment: The MnDOT recommends that the identification of projects with an estimated cost of less than \$500 million, where FHWA requires a submission of financial plans, be done at the time of the National Environmental Policy Act (NEPA) decision and include a written explanation from FHWA.

FHWA Response: The preparation of financial plans for other projects (projects with an estimated cost of \$100 million or more that are not designated major projects) is required by statute (23 U.S.C. 106(i)). They are to be made available for review upon request by FHWA. The statute does not require specific notification or rationale for requesting the submission of financial plans for other projects. The FHWA Division Offices will work with project sponsors to establish expectations for financial plans for other projects as part of the Division Office's overall stewardship and oversight approach. No changes have been made to the guidance.

Comment: The MnDOT recommends a standardized process be implemented to ensure that the requirement to submit annual updates based on reasonable assumptions “as determined by the Secretary” is applied consistently by FHWA.

FHWA Response: This updated guidance along with the technical assistance provided by FHWA staff to project sponsors is intended to promote consistency in the FHWA review of financial plans. No changes have been made to the guidance.

V. General – Project Applicability

Comment: The AHTD recommends that financial plans should only be completed if the Federal funds used for the project are \$80 million or more.

FHWA Response: The threshold for financial plans is contained in statute (23 U.S.C. 106(h)(1)) and does not specify a minimum amount of Federal financial assistance. No changes have been made to the guidance.

Comment: The PECG commented that the guidance, especially with respect to the P3 assessment, should not apply to all TIFIA assisted projects.

FHWA Response: The requirement for the P3 assessment is contained in the statute (23 U.S.C. 106(h)(3)(D)) and therefore, must be applied to TIFIA assisted projects that require compliance with major project financial plan requirements. No changes have been made to the guidance.

VI. General – Guidance References

Comment: The NDOT recommends including, by reference, accompanying documents that must be read at the same time to understand and put into context changes in the guidance. The NDOT specifically mentions the Operational Independence and Non-

Concurrent Construction guidelines, the FHWA Major Project Program Cost Estimating Guidance, and any risk management reference.

FHWA Response: The reference to the Major Project Program Cost Estimating Guidance is included in the Major Project Financial Plan Guidance. This revised guidance replaces the previously separate Operational Independence and Non-Concurrent Construction guidelines and there is no FHWA risk management reference included in this guidance. No changes have been made to the guidance.

VII. General – Fiscal Constraint Requirements (23 U.S.C. 134 and 135)

Comment: AASHTO recommends that project sponsors be allowed to submit an initial financial plan prior to the completion of NEPA to be used as the basis for meeting fiscal constraint requirements.

FHWA Response: As noted in the guidance, the FHWA will not approve a major project financial plan until the selected alternative for the project has been identified in the NEPA decision document for the project. An annual financial plan is a comprehensive document that reflects the project's scope, schedule, cost estimate, and funding structure to provide reasonable assurance that there will be sufficient funding available to implement and complete the entire project, or a fundable phase of the project, as planned. This documentation cannot be prepared until a project has been identified through the NEPA process. No changes have been made to the guidance.

Comment: AASHTO recommends that the guidance should state that financial plans prepared during the NEPA process will have a lower level of detail than a financial plan that is prepared at a later stage of project development.

FHWA Response: This guidance only applies to financial plans needed to meet the major project requirements. Financial plan approval is required from FHWA prior to the first Federal construction authorization. The FHWA will not approve a major project financial plan until the selected alternative for the project has been identified in the NEPA decision document for the project. No changes have been made to the guidance.

VIII. General – Risk Assessments

Comment: The NDOT commented that the guidance does not separate the Planning Stage Risk Assessment Process with its corresponding level of effort versus the Major Project Risk Assessment Process. The NDOT recommends that under the phased plan discussion, additional guidance should be provided to explain the risk assessment expectations for projects within the Statewide Transportation Improvement Program (STIP), for projects 2 to 3 years outside the STIP, and projects within the 20-year Long Range Plan. The NDOT also recommends that the guidance describe the specific level of effort for preparing and maintaining a risk register and include risk management expectations for the projects and risk strategies to deliver projects early if funding is identified after the financial plan has been approved.

FHWA Response: This guidance only applies to financial plans needed to meet the major project requirements. It is not intended to prescribe to project sponsors the methods and efforts required to conduct project risk assessments and develop and implement risk

strategies. This comment is outside the established scope of the guidance. No changes have been made to the guidance.

IX. Project Funding

Comment: For a phased financial plan, the NDOT recommends the guidance clarify that the identified funded phase is the only portion of the project that is to be fiscally constrained.

FHWA Response: The guidance does note in Section 4 under Contents of the Financial Plan that detailed funding information only needs to be included for each funded phase. No changes have been made to the guidance.

X. Operationally Independence and Non-Concurrent Construction (OINCC) Projects

Comment: The AHTD and the Wisconsin Department of Transportation (WisDOT) recommend that the guidance clarify the definition of OINCC. Similarly, AASHTO recommends that the guidance clarify that a finding of OINCC is not required for each phase of the project that is covered in a phased financial plan. The AASHTO and the WisDOT further recommend that the term “phase” should not be used to refer to a project stage that is determined to be OINCC. Additionally, AASHTO recommends that the guidance clarify that a finding of OINCC is required only if the project defined in the NEPA document will be divided into small projects, each of which will be covered in a separate financial plan.

FHWA Response: FHWA has revised the definition of OINCC in the guidance to clarify discussion on phased financial plans. Specifically, the term “phase” will not be used in

the definition. The guidance now specifies that each phase of a phased financial plan does not have to meet the OINCC criteria and that such a finding is needed only when the project defined in the NEPA document will be divided into smaller portions for the purposes of applying major project requirements.

Comment: AASHTO recommends that the application of the OINCC criteria be flexible and pragmatic. Specifically, AASHTO recommends that the 5-year and 20-year periods be used as general guides, not rigid requirements. The AASHTO also recommends that the guidance include examples to describe the types of projects that would (and would not) be considered OINCC.

FHWA Response: The FHWA will continue to be flexible and pragmatic regarding the entire guidance. Due to the varied characteristics of major projects, examples would not be able to cover the many potential scenarios and therefore will not be included in the guidance. The FHWA staff will be available to discuss the OINCC criteria with project sponsors. No changes have been made to the guidance.

Comment: The Colorado Department of Transportation (CDOT) commented that the 20-year threshold is excessive because of changing priorities and the unpredictability of OINCC projects within that period. The CDOT further recommends that subsequent OINCC projects could be determined with the remaining criterion of a 5-year threshold between the completion of one portion and the beginning of the next portion. Finally, CDOT recommends that if funding is identified for future OINCC projects, they may be added to a project's financial plan. Similarly, the AKDOT & PF commented that the 20-

year threshold criterion should be removed and that a State DOT should be able to adapt to changes in available funding to accelerate the project schedule.

FHWA Response: The OINCC section has been revised to clarify the application of the criteria and identify when financial plans are required for OINCC projects. The 20-year threshold ensures that the OINCC guidance is used for projects that are scheduled to be delivered over such an extended period of time that it is not realistic to expect that a project sponsor's financial plan can provide enough detail for the entire project. The 5-year threshold is the time between the OINCC project and the next portion of the overall project. The threshold is used to determine if non-concurrent construction exists between separate portions of the overall project. Requests for revisions, as a result of changes in funding availability to an OINCC project determination, should be submitted to the FHWA Division Office.

Comment: The NDOT recommends that the three criteria for OINCC should be guidelines, not specific requirements.

FHWA Response: The criteria are considered guidelines and the application of each criterion will be considered by FHWA on a project specific basis. No changes have been made to the guidance.

Comment: The NDOT recommends that the guidance clarify when a financial plan for OINCC projects is required and the level of detail needed to conduct a risk assessment.

FHWA Response: The guidance has been revised to clarify when financial plans for OINCC projects are required. This guidance is for the preparation of major project

financial plans. It is not intended to prescribe to project sponsors the methods and efforts required to conduct project risk assessments.

XI. TIFIA Projects

Comment: The CDOT recommends that when TIFIA assistance is provided to a project, an approval from the TIFIA Office for both the initial major project financial plan and annual updates would simplify and streamline the approval process for the project sponsors.

FHWA Response: When TIFIA assistance is provided to a project, the initial financial plan and annual updates are reviewed by both the Project Delivery Team and the TIFIA Office. A consolidated concurrence from both the TIFIA Office and Project Delivery Team is prepared. The Division Office will then provide the approval to the project sponsor. This review process incorporates a multi-disciplined approach as each office has a different function. No changes have been made to the guidance.

Comment: AASHTO recommends that the guidance clarify that it is permissible, but not required, to submit a single document that serves as both the major project financial plan and the TIFIA financial plan.

FHWA Response: The guidance does not require the submission of a single document, however, it may be more efficient to submit one financial plan since it is a TIFIA requirement that the TIFIA financial plan be prepared in accordance with major project financial plan guidance. The guidance has been clarified.

Comment: AASHTO states that the entity submitting the major project financial plan may be different than the entity submitting the TIFIA financial plan.

FHWA Response: FHWA recognizes in the guidance that there may be multiple documents submitted by multiple project sponsors needed to meet the requirement of a major project financial plan and the requirement of a TIFIA financial plan. However, the documents would supplement each other and together satisfy both requirements. No changes have been made to the guidance.

Comment: AASHTO states that the requirement to submit annual updates under a TIFIA loan agreement extends for the duration specified in the agreement while the requirement to submit annual updates for major projects extends only through the completion of construction.

FHWA Response: The guidance notes that the submission of annual updates of projects with TIFIA assistance may extend beyond substantial completion of the project. The TIFIA office requires its financial plans to be prepared in accordance with the major project financial plan guidance after the completion of construction. The guidance also notes that after the major project requirements have been met, financial plans with TIFIA assistance may be required throughout the life of the loan. No changes have been made to the guidance.

Comment: AASHTO recommends clarification that the guidance can be superseded by provisions in the TIFIA loan agreement or other project agreements with FHWA and/or DOT.

FHWA Response: All TIFIA loan agreements, regardless of total project cost, require the borrower to submit annual financial plans in accordance with this guidance. The methods for developing and updating major project financial plans presented in the guidance are not legally binding requirements, and may be modified, as appropriate by TIFIA loan agreements or other legally binding agreements, to meet both the TIFIA and other legal requirements. No changes have been made to the guidance.

XII. Multiple Project Sponsors

Comment: The NDOT asks if a project sponsor, whose only role was to contribute certain funds to the project, has to provide a certification for the entire financial plan or just for their contribution.

FHWA Response: The guidance now includes a definition of a project sponsor. A project sponsor is defined as an entity that provides funds for the project and administers any Construction or Construction Engineering/Inspection activities for the project. If an entity was only providing funds and not administering construction related activities, then a financial plan letter of certification from that entity is not required.

Comment: The NDOT recommends defining the term “otherwise” in the sentence: “If the State DOT granting the concession has also provided funds (whether Federal-aid or otherwise), then both the public and private entities would be considered Project Sponsors.” The NDOT also recommends adding that P3s should submit a financial plan.

FHWA Response: The phrase “Federal-aid or otherwise” has been replaced with “any type of funds.” The guidance states that single or multiple financial plans can be

submitted at the discretion of the project sponsors. This may include financial plans from P3s.

Comment: AASHTO recommends that the guidance clarify if it is permissible for each project sponsor to submit a separate financial plan when there are multiple project sponsors.

FHWA Response: The guidance allows for each project sponsor to submit separate financial plans for its portion of the project. No changes have been made to the guidance.

XIII. Financial Plan Submission Process

Comment: E&Y and the NDOT recommend that the guidance clarify that projects other than design/bid/build projects will not be subject to stricter standards, but FHWA will allow flexibility in the timing of the initial financial plan submissions. The E&Y further recommends that the guidance include examples of possible timeframes and suggest ways for the FHWA Division Offices to coordinate with project sponsors regarding financial plan submissions.

FHWA Response: This guidance will be applied to all projects regardless of procurement method. For all projects, the initial financial plan should be approved prior to the first authorization of Federal funds for construction. Since major projects procurement methods are often unique, there would be too many timeframe examples to include in the guidance to cover all scenarios. The guidance states that project sponsors should coordinate with FHWA Division Offices regarding financial plan submittals for projects other than design/bid/build. No changes have been made to the guidance.

Comment: The MnDOT recommends that the FHWA Division Office Financial Manager should be the one designated contact to ensure conformity across plans.

FHWA Response: The guidance is intended to ensure that consistency of financial plan reviews. It is at the discretion of each FHWA Division Office to designate points of contact for its oversight activities. No changes have been made to the guidance.

Comment: The WSDOT recommends annual updates be submitted no later than 90 days after the end of each reporting period or “unless otherwise specified in other project related obligations (e.g. TIFIA agreements).”

FHWA Response: The guidance recognizes that TIFIA agreements may affect submission dates and reporting periods in the Financial Plans Including TIFIA Assistance section. The revision proposed by WSDOT for “other project related obligations” is too broad to be included since it could be interpreted that non-Federal project related obligations could impact the timing of annual update submissions. No changes have been made to the guidance.

Comment: The WSDOT recommends allowing a designee, delegated in writing from the Chief Executive Officer, to sign the project sponsor certification.

FHWA Response: It is acceptable for a designee delegated in writing from the Chief Executive Officer, to sign the project certification. The guidance has been revised to adopt this recommendation.

XIV: Project Description

Comment: The WSDOT recommends adding examples (e.g. for toll funding, local government pledged funding, etc.) in the Project Description of types of anticipated funding. The WSDOT further recommends providing examples of what should be included when evaluating the likelihood of anticipated amounts being dedicated.

FHWA Response: The guidance has been revised to remove the identification of funding in the Project Description section of the guidance. The identification of funding for phased financial plans is discussed in the Project Funds section. Due to the varied characteristics of major projects, examples would not be able to cover the many potential scenarios and therefore, will not be included in the guidance. The FHWA staff will be available to discuss the different types of projects and project funding sources.

Comment: AASHTO recommends that the guidance not require an “outline” of the entire environmental review process. They stated that it should be sufficient to describe the components of the project as they are defined in the applicable NEPA document.

FHWA Response: It is important that FHWA has a clear understanding of the environmental review process since it results in the identification of the project scope. The term “outline” is used in the guidance to convey that a detailed discussion is not required. No changes have been made to the guidance.

XV. Project Cost

Comment: The AKDOT & PF and WSDOT recommend that including the costs of NEPA and other environmental documentation should be revisited. Large corridor

projects often have multiple layers of environmental documentation that go back over many years. The AKDOT&PF recommends that FHWA should work with project sponsors to determine appropriate boundaries for these costs.

FHWA Response: The purpose of including NEPA and other environmental documentation costs is to have a total cost for the major project. The FHWA will continue to work with project sponsors to determine appropriate boundaries for all project costs. No changes have been made to the guidance.

Comment: The WSDOT, NDOT, and AASHTO recommend that FHWA allow for alternatives to the FHWA Cost Estimate Review (CER) process, including those developed by the project sponsor. The WSDOT and AASHTO further recommend that FHWA not mandate the use of 70th percentile costs.

FHWA Response: The guidance has been revised to address alternative CER processes or variations from the 70th percentile cost. Alternatives to the CER process and variations from the 70th percentile cost will be considered by FHWA on a case-by-case basis.

Comment: The NDOT questioned if CERs are needed for other specific milestones.

FHWA Response: CERs should be conducted prior to the submission of the initial financial plan. Major changes that occur in the project that significantly affect the estimated cost of the project should be evaluated to determine if an additional CER needs to be conducted. The guidance has been revised to include a reference to when additional CERs may be considered.

Comment: AASHTO recommends that the project sponsor participate in the CER.

FHWA Response: It is important for the project sponsor to participate in the CER since the project sponsor is often the best source to provide project information and answer questions. The guidance has been revised to indicate that the project sponsor should participate in the entire CER.

XVI. Project Funds

Comment: The CDOT commented that referring to advance construction funds as State funds will confuse the presentation of the financial plan. Providing a statement of amounts converted in the annual updates will achieve the desired objective. The CDOT recommends eliminating this requirement from the initial financial plan, but instead recommends reporting the conversion amounts in the annual update. The WisDOT recommends State DOTs be excluded from reporting annual conversion amounts when using advance construction to manage funds internally within a budget year, but not as a special funding technique that borrows from future Federal funds.

FHWA Responses: The guidance has been revised to eliminate the reporting of estimated annual conversion amounts. Project sponsors should work with FHWA to identify a mutually agreeable method to show advance construction in the financial plans. In all cases the total special funding technique amount, the amount converted to date, and the amount remaining should be reported.

Comment: The WisDOT comments that there would be an inconsistency between financial plans and State budget authority if the financial plan included the annual conversion amounts.

FHWA Response: The guidance has been revised to clarify how special funding techniques are documented and that estimated annual conversion amounts do not need to be provided. The financial plan will only reflect actual conversion amounts and so there should be no inconsistency.

XVII. Financing Issues

Comment: E&Y and WSDOT recommend that financing from debt proceeds address project-specific debt, or incremental additional borrowing related to the project, and not programmatic financing. Similarly, AASHTO recommends that the guidance allow project sponsors discretion to determine the appropriate level of detail in discussing financing costs. When a project sponsor is not proposing project-specific borrowing, AASHTO recommends that the project sponsor should not be required to quantify borrowing costs. Where a project sponsor is proposing to issue bonds specifically for the project, AASHTO recommends that it should be sufficient for the financial plan to provide an estimate of annual payments and revenues.

FHWA Response: FHWA recognizes that project-specific financing cost information is more readily available. When project-specific debt is issued, the financial plan should show the total cost of financing for the project, which could be an estimate if that is the best information available at the time of the financial plan submission. The programmatic

financing cost discussion would be at a programmatic level of detail. No changes have been made to the guidance.

Comment: The AKDOT&PF and WSDOT believe that the adequacy of the financial plan should be based on the ability to fully fund and complete construction, not on future debt service for non-Federal financing. The WisDOT recommends flexibility to allow project sponsors to determine the level of total debt financing for a project because at the time of the initial financial plan adoption, the total financing cost for a project is not known.

FHWA Response: The purpose of the Financing Issues section of the financial plan is to document financing costs and estimates to fully fund and complete construction of the project. Non-Federal financing will not be evaluated and FHWA will not make a determination on whether the project sponsor is capable of repayment. Any changes to the amount of financing costs or estimates can be reflected in annual updates to the initial financial plan. No changes have been made to the guidance.

XVIII. Cash Flow

Comment: E&Y and the NDOT recommend adding clarification or an example narrative for the discussion of the project sponsor's ability to deliver its capital program in the guidance. The MnDOT and NDOT offer that the project sponsor could be allowed to refer to a current annual STIP Financial Report to demonstrate the project sponsor's ability to deliver its capital program.

FHWA Response: The guidance has been revised to remove the discussion on the overall impact of the project sponsor's ability to deliver the State transportation capital program. As discussed in the guidance, the review of the STIP is an important step by FHWA in the review and approval process for financial plans. This review of the STIP, along with the option of submitting a phased financial plan, makes further discussion on the overall impact of the project sponsor's ability to deliver its capital program unnecessary.

Comment: The MnDOT recommends that FHWA consider drawing on the expertise of financial credit rating agencies when assessing the credibility of a project sponsor for major projects.

FHWA Response: This guidance is not intended to document the FHWA methods and efforts required to assess the creditability of a project sponsor. This comment is outside the established scope of the guidance. No changes have been made to the guidance.

XIX. Public-Private Partnership Assessment

Comment: The PECG recommends that the P3 assessment include a complete cost-benefit analysis to deliver the project with a detailed list of contents in the analysis.

FHWA Response: Title 23 U.S.C. 106(h) requires the financial plan to include an assessment regarding the appropriateness of a P3 to deliver the project. The guidance includes appropriate discussion regarding the comparison of benefits and challenges of procuring the project as a P3 compared to traditional procurement methods. The guidance is intended to allow different assessment methods by project sponsors. No changes have been made to the guidance.

Comment: The PECG recommends that public servants be used, rather than private sector employees, to perform all construction inspection functions for P3 projects.

FHWA Response: This guidance is for the preparation of financial plans and is not intended to prescribe project sponsor decisions for how the project is managed, including how project inspection services will be performed. This comment is outside the established scope of the guidance. No changes have been made to the guidance.

Comment: E&Y and the NDOT recommend that FHWA should not second guess the project sponsor's delivery decision based on the P3 assessment.

FHWA Response: The purpose of the P3 assessment is to provide a brief documentation of the procurement decisionmaking process. The P3 assessment is not intended to prescribe a process for the project sponsor's delivery decision or to evaluate the decision of the project sponsor. The guidance is consistent with this purpose. No changes have been made to the guidance.

Comment: The AHTD recommends that if P3 mechanisms are not allowed by State law, there should be no reporting requirements. The WisDOT recommends that if there is no enabling legislation for P3s, then a generic statement to that effect will suffice for responding to this section. The AASHTO recommends that the consideration of a P3 be brief if it is obvious that a P3 is not viable because of State law and there is no reasonable basis for expecting that law to change.

FHWA Response: The guidance identifies the items that should be covered in the narrative to assess the appropriateness of a P3 to deliver the project. The absence of legislative authority is included in these items. Therefore, if State law does not allow the use of P3s, then the narrative should reflect that. No changes have been made to the guidance.

Comment: The AHTD recommends that when tolling, bonding, or TIFIA financing methods are not appropriate for the project, previous analyses should be adequate with no further reporting requirements.

FHWA Response: The guidance notes that the P3 assessment is a narrative describing the process used to consider whether a P3 procurement is appropriate to deliver the project. Referencing and summarizing previous analyses may be adequate to meet these criteria. No changes have been made to the guidance.

Comment: The MnDOT states that the analysis for a P3 delivery would be based on historic rather than recent consideration. The WSDOT recommends that only the results of earlier P3 analyses, if any, should be identified in the initial financial plan. Similarly, AASHTO recommends that the guidance should specify that the discussion of a P3 should include the reasons for or against using a P3 when the decision is made by the time the initial financial plan is submitted.

FHWA Response: A P3 assessment can be based on a previous project level analysis. If a P3 assessment has not been conducted at the time of the initial financial plan preparation, then an assessment must be done before the initial financial plan is submitted

to meet the statutory requirements in 23 U.S.C. 106(h). The guidance has been revised to clarify when a P3 assessment is required for phased financial plans. The P3 assessment for the unfunded portion of a phased financial plan should be provided in annual updates as the portion of the project is added to the financial plan.

Comment: AASHTO recommends that annual updates to a financial plan should not be required to revisit the appropriateness of a P3, and that it should be sufficient for the annual updates to summarize the assessment that was included in the initial financial plan.

FHWA Response: There is no need to revisit the appropriateness of a P3 in the financial plan, except in the case of phased financial plans when a new portion of the project is added or when the procurement method changes to use a P3 or not. No changes have been made to the guidance.

XX. Final Major Project Financial Plan Guidance

The FHWA has updated its Major Project Financial Plan Guidance. The FHWA published the proposed guidance for public comment on September 6, 2013. After considering all the comments, the FHWA has incorporated all appropriate edits into the guidance. As such, the revised guidance, which can be found at <http://www.fhwa.dot.gov/ipd> , will be in effect for all financial plans submitted to FHWA [INSERT 45 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

Authority: 23 U.S.C.315; 23 CFR 633.104(a)

Issued on: December 9, 2014.

Greg G. Nadeau,
Acting Administrator,
Federal Highway Administration.

[FR Doc. 2014-29653 Filed 12/17/2014 at
8:45 am; Publication Date: 12/18/2014]